SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 624

PHOENIX FINANCE CORPORATION, A CORPORATION OF THE STATE OF DELAWARE,

Petitioner,

vs.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION OF THE STATE OF DELAWARE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JAMES R. MORFORD,
Counsel for Petitioner.

CASPER SCHENK,
Of Counsel.

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Foreword.

It is stated in "Jurisdiction of the Supreme Court of the United States" by Robertson and Kirkham, Sec. 29, p. 559, that it is "not uncommon for the Supreme Court to withhold its ruling upon a petition for certiorari until the happening of intervening events shall have assisted in a determination of the question whether the writ should issue."

The decision of the Circuit Court of Appeals for the Eighth Circuit, for the review of which the within petition is filed, is opposed on the same facts to the decision of the Superior Court of Delaware. *See Summary Statement (b)*, 1, p. 7, *infra*, *Phoenix Finance Corporation* v. *Iowa-Wisconsin Bridge Company*, 14 Atl. (2d) 386.

Writ of error to the Supreme Court of Delaware in the case is pending and will be argued at the January Term, 1941. *See Clerk's Certificate attached as an addendum hereto.*

The Supreme Court, in accordance with the principle above stated, has withheld action upon petition for certiorari until decision by State courts indicate whether review is warranted. Thus, in *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 53 S. Ct. 98, it appears (footnote p. 163, 287 U. S., p. 100, 53 Sup. Ct.) that the petition, although filed October 30, 1931, was not granted until April 25, 1932, 286 U. S. 536, 52 S. Ct. 499, action thereon being withheld "awaiting the action of the Supreme Court of Idaho in the matters pending before it." Journal Sup. Ct., October Term 1931, p. 163 (Jan. 11, 1932).

Although it does not appear from the report, *Robertson and Kirkham, supra* (p. 560), have cited *Michalek v. United States Gypsum Co.*, 298 U. S. 639, 56 S. Ct. 679, as another case where "action on the application for certiorari was withheld several months for a decision of a state supreme court on a controlling question of law." In that case, it

appears that the decision of the highest court of New York (270 N. Y. 287, 200 N. E. 824) being contrary to the result reached by the Federal court as to one of the causes of action, certiorari was there granted and the judgment reversed *per curiam*, as to that cause of action, upon the authority of the decision of the New York Court of Appeals.

By the prayers of the within petition (p. 19), the petitioner has asked this Court to "withhold its ruling * * * until the determination by the Supreme Court of the State of Delaware" of the pending writ of error.

The above is not to be construed as an admission by the petitioner that this petition for writ of certiorari should be denied in the event the Supreme Court of Delaware should reverse the Superior Court. The petitioner stands upon the merits of its petition regardless of the outcome of the writ of error pending in the Supreme Court of Delaware.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Phoenix Finance Corporation respectfully represents:

I.

Summary Statement of the Matter Involved.

It is essential to a proper understanding of the matter involved that the Court consider and be cognizant of the factual and procedural status of *both* of two litigated causes below, *i. e.*, the "Foreclosure Cause" and the "Supplemental and Ancillary Cause" hereinafter mentioned. The

intervening facts, claimed as the inducement for the second or Supplemental and Ancillary Proceeding, are separately summarized.

(a) The Foreclosure Cause.

Deed of Trust Foreclosure Cause as an original proceeding in the United States District Court for the Northern District of Iowa. Original parties: *First Trust & Savings Bank (an Iowa corporation) and Schubert (a citizen of Wisconsin), Trustees, complainants; Iowa-Wisconsin Bridge Company (herein sometimes referred to as "Bridge Company"), a Deloware corporation, defendant* (F. R.[1] 1).

Upon intervention petition of Kendrick and others (F. R. 73-83), Phoenix Finance Corporation (hereinafter sometimes referred to as "Phoenix"), *also a Delaware corporation*, though not named in petition, made involuntary party complainant (F. R. 85, 86). Phoenix as the holder of more than 25% of the bonds secured by the Deed of Trust, the basis of the Foreclosure Cause, had requested Trustees to foreclose and had agreed to indemnify Trustees for expenses incurred (F. R. 789-791; 794-795).

Phoenix appeared and answered intervention petition (F. R. 91-92) by pleading ignorance of certain alleged acts of fraud on the part of *Phoenix Finance System, Inc.*,[2] charged as occurring for the most part in 1930 and early 1931. Phoenix not incorporated until December 29, 1931 (F. R. 542). No allegations or subsequent evidence as to identity of interest as between Phoenix and *Phoenix Finance Sys-*

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[1] Whenever in this petition and brief, a record reference is designated as "F. R.," the certified and printed record in connection with former petition in this Court for certiorari on behalf of Phoenix Finance Corporation (No. 438, October Term, 1938) in the Foreclosure Cause is intended. Whenever the record reference is designated as "R," the certified and printed record in this cause in the Supplemental and Ancillary Proceeding is intended.

[2] Not to be confused with petitioner.

tem, Inc. appears in Foreclosure Record except testimony (F. R. 541) defining status as assignee and assignor, respectively, of certain claims. *No evidence of fraud on part of Phoenix Finance System, Inc. chargeable in any way to Phoenix.*

Issues in Foreclosure Cause referred to a Master (F. R. 107-108). Phoenix did not participate in trial before Master and offered no evidence. The trustee complainants had "exclusive control" of the litigation (F. R. 211). Tacit understanding of all parties and Master as to procedure at trial was that there were two distinct stages in the proceeding, viz., (1) *the issue of the validity of the Deed of Trust,* and, if Deed of Trust was found valid to any extent and foreclosure ordered, (2) *the issue as to what bonds were validly entitled to participation in proceeds of sale* (F. R. 225, 226, 228-230, 259, 282, 363, 451, 561, 637, 693, and Exhibit S. C. 106, R. 584). This procedural understanding (or misunderstanding) is also evidenced by "Suggestions of Respondents, First Trust and Savings Bank and A. H. Schubert as Trustees" filed in this Honorable Court in connection with petition for writ of certiorari in said Foreclosure Cause (No. 438 October Term 1938) in part as follows:

> "The Trustees presented the case in the District Court on the theory, believed to have been accepted by the Master in Chancery, that only one issue was then up for consideration, namely, the right to a foreclosure of the Mortgage Deed of Trust, and assumed that the question of the validity of the bonds would not be taken up until after a foreclosure was ordered (R. 224-230).[3] That is to say, the trustees never pretended to represent bondholders for any other purpose except that relating to the security under the mortgage.

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[3] The reference is to record herein designated as the Foreclosure Record, or "F. R.."

"At no time, did Counsel for the trustees attempt to prove the validity or disprove the invalidity of any individual bond, as such. With the controversy between the mortgagor and the bondholders relating to the validity of individual bonds, the trustees felt they had nothing to do. Petitioner Phoenix Finance Corporation, the only bondholder in Court, was represented by its own Counsel (R. 91-92, 228-230).[4]

"Counsel feel that if bondholders are to assume that they were represented in the courts below by us, they have reason to be dissatisfied with their representation."

Case never went beyond first procedural stage, and Master held Deed of Trust and bonds secured thereby partially valid and partially invalid, and recommended foreclosure (F. R. 138) to the extent held valid. District Court partially affirming and partially reversing Master decreed (F. R. 202-204):

"And the Court now being fully advised in the premises, it is Ordered, Adjudged, and Decreed that the findings and conclusions of the Master, except as modified and amplified by additional findings, be adjudged as the findings and conclusions of the Court, with such additional findings and conclusions as are filed in the cause. That the mortgage and bonds in suit were fraudulently issued. That all bonds are without valid consideration, with the exception of the bonds aggregating $15,000, hereinafter specified. That the bill of the plaintiffs be dismissed as to the plaintiff, Phoenix Finance Corporation, and that the prayer of the bill be denied, except in so far as the Decree provides for the protection of the holders of said $15,000[5] in bonds. *That foreclosure and sale of the mortgaged property be denied* * * *." (Emphasis supplied.)

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[4] The reference is to record herein designated as the Foreclosure Record, or "F. R."

[5] This $15,000 not related directly or indirectly to any issues raised by Supplemental and Ancillary Proceedings.

Phoenix petitioned for rehearing (F. R. 216-224) with supporting affidavits (F. R. 224-391). Denied (F. R. 411).[6] On appeal to Circuit Court of Appeals for the Eighth Circuit, decree below in Foreclosure Cause affirmed (Opinion, F. R. 1689, 98 F. (2d) 416; Decree, F. R. 1709). Petition for writ of certiorari to Supreme Court of the United States denied (305 U. S. 650, 676; No. 438 October Term 1938).

(b) The Proceedings Prior to the Filing of the Supplemental and Ancillary Bill.

After final disposition of the Foreclosure Cause, Phoenix docketed four suits against the Bridge Company at law in the Superior Court of the State of Delaware and one suit in equity in the Court of Chancery of said State, as follows:

1. Action of assumsit on Bridge Company notes, $3,125 and $2,000[7] (Exhibits S. C. 101, R. 386); Bridge Company appeared generally; filed plea of *res adjudicata;* case tried by stipulation before court without jury on sole issue of *res adjudicata* based upon decree of December 1, 1936 in the Foreclosure Cause; judgment[8] for plaintiff rejecting defense of *res adjudicata* on opinion of two of six judges of Supreme Court of State of Delaware sitting in *nisi prius* (see *Phoenix Finance Corporation* v. *Iowa-Wisconsin Bridge Company,* 14 Atlantic (2d) 386); *this case now pending on writ of error to Supreme Court of Delaware; argument set for January Term 1941.*[9]

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[6] Charged by Answer and Counterclaim of Phoenix in Supplemental and Ancillary Cause, hereinafter mentioned, that denial of rehearing was the result of fraudulent tactics of interveners and counsel (R. 166-167).

[7] These notes were part of $17,735.19 of notes for which $20,100 of Bridge Company bonds (secured by the Deed of Trust involved in the Foreclosure Cause) were delivered to Phoenix *as security only* (F. R. 829).

[8] The decree below orders Phoenix and its attorneys to satisfy this judgment at its own costs.

[9] See Certificate of Clerk of Supreme Court, *addendum* hereto.

2. Action of assumpsit [10] on Bridge Company notes, $500 and $12,110.19 [11] (Exhibit S. C. 103, R. 482); Bridge Company appeared generally; pleaded *res adjudicata* based upon decree in Foreclosure Cause; case pending trial but further action enjoined by decree of District Court this cause.

3. Action of covenant [10] for breach of sealed agreement of November 10, 1940; damages claimed $21,262.71, actual loss of assignor of Phoenix (Exhibit S. C. 104, R. 522). General appearance and plea of *res adjudicata* based upon Foreclosure Cause. Further action enjoined as in 2.

4. Action of debt [10] on two $500 Series "B" bonds of Iowa-Wisconsin Bridge Company (parcel of the bonds secured by the Deed of Trust in the Foreclosure Cause —Exhibit S. C. 105, R. 546). These bonds purchased by Phoenix for value after institution of Foreclosure Cause from one not a party to and not appearing in Foreclosure Cause. General appearance and plea of *res adjudicata* based upon decree in Foreclosure Cause. Further action enjoined as in 2.

5. Bill of Complaint [10] in Court of Chancery to compel Bridge Company to issue to Phoenix Finance Corporation 517 shares of Bridge Company preferred stock which Bridge Company received from Phoenix Finance Corporation in exchange for bonds (parcel of the bonds for which the Deed of Trust in the Foreclosure Cause was security). The transaction is attacked in the Court of Chancery of Delaware solely on the ground that at the time the Bridge Company acquired its own shares of stock in the aforesaid transaction, its capital was impaired, in violation of 2051 Section 19 of the Revised Code of the State of Delaware (1935)[12] and in violation of the appropriate provisions

[10] The decree below orders Phoenix and its attorneys to discontinue these actions at its own costs.

[11] These notes also were part of $17,735.19 of notes for which $20,100 of Bridge Company bonds (secured by the Deed of Trust involved in the Foreclosure Cause) were delivered to Phoenix *as security only* (F. R. 829).

[12 and 13] Quoted in supporting brief (footnotes pp. 27-28 *infra*).

of its corporate charter.[13] Bridge Company appeared generally and by answer set up defense of *res adjudicata* based upon decree in Foreclosure Cause. Further action enjoined as in 2.

In addition to commencing the foregoing actions, Phoenix also filed for record in Allamakee County, Iowa, and in Crawford County, Wisconsin, a certain $50,000[14] mortgage dated March 10, 1931, given by the Bridge Company to Phoenix Finance System, Inc. and assigned to Phoenix.[15]

(c) The Supplemental and Ancillary Cause.

After all of the foregoing steps had been taken by Phoenix and after the Bridge Company had submitted itself to the jurisdiction of the Delaware courts and had tried the first Delaware lawsuit and pending decision therein, it filed in the United States District Court for the Northern District of Iowa a *Supplemental and Ancillary Bill of Complaint* wherein Iowa-Wisconsin Bridge Company, a corporation of the State of Delaware, is sole complainant, and Phoenix Finance Corporation, a corporation of the State of Delaware, is sole defendant (R. 3). Phoenix appeared and after its original answer and cross-bill was stricken on motion (R. 749), it filed an answer and counterclaim (R. 146), a portion of which was likewise stricken by order of court (R. 171).

The primary defense was one of law, viz., that the decree of December 1, 1936 in the Foreclosure Cause did not and legally could not constitute a valid adjudication against Phoenix on its underlying indebtedness against the Bridge

[14] This mortgage is not to be confused with the $200,000 Deed of Trust which was the subject of the Foreclosure Cause. This is an "open" mortgage providing for further anticipated financing beyond $50,000, and by reason of further advances of $9,000 to pay liens against the bridge is now security for a total debt of $59,000.

[15] The decree below commands Phoenix to satisfy this mortgage of record and to deliver note to Clerk of District Court for cancellation.

Company (1) because Phoenix was not an indispensable party against whom such an adjudication could be made, and (2) because a determination as to the validity of Bridge Company notes held by Phoenix and other claims against the Bridge Company was not within the issues of the Foreclosure Cause.

Entirely apart from said primary legal defense, the parts of the answer so stricken raise the defense of fraud in the procurement of the decree in the Foreclosure Cause (and particularly in the denial of the petition for rehearing (R. 166-167) the defense that the defendant had not done equity (and particularly the application thereof known as "Lord Redesdale's Rule") and the defense that the complainant was in court with unclean hands. In addition, Phoenix, by the stricken portion of its answer, asserted a counterclaim against the Bridge Company for $98,349.46 exclusive of interest (Exhibit S. C. 114, R. 595 *et seq.*).

Phoenix sought to take depositions of witnesses to prove facts in support of its answer and counterclaim. It was denied such right by order of the District Court (R. 223, 256). At the trial, further evidence offered by Phoenix was rejected (R. 275-292). Eliminating the rejected evidence, there were substantially no controverted facts, and decree for complainant followed, dated March 23, 1940 (R. 719).

By the decree, Phoenix was:

(1) Permanently enjoined and restrained from conducting or carrying forward in any manner whatsoever any and all of the Delaware actions above mentioned;

(2) Required forthwith to dismiss all of said actions at its own cost and to satisfy the judgment which had theretofore been obtained in the action first above mentioned (14 Atl. (2d) 386);

(3) Ordered to release, satisfy, and remove from record both in Allamakee County, Iowa, and in

Crawford County, Wisconsin, the said mortgage of March 10, 1931;

(4) Ordered to deliver the original of said mortgage and the note secured thereby to the Clerk of the District Court for cancellation;

(5) Permanently enjoined and restrained from commencing, prosecuting or bringing in question, or in any manner carrying forward, any suits or causes of action purportedly *involved* in the findings of fact, conclusions and decree of December 1, 1936 in the Foreclosure Cause and the order denying rehearing and modification thereof of March 4, 1937.

On appeal to the Circuit Court of Appeals for the Eighth Circuit, the foregoing decree was affirmed (Opinion, R. 767, Decree, R. 787). Mandate stayed pending determination this petition (R. 833).

II.

Statement of Supreme Court's Jurisdiction to Review the Decree in Question.

The jurisdiction of the Supreme Court of the United States to review the decree of the Circuit Court of Appeals for the Eighth Circuit affirming the decree of March 24, 1940 of the United States District Court for the Northern District of Iowa is found in sub-paragraph (2) of Section 240 of the Federal Judicial Code as amended (28 U. S. C. A., Sec. 347) as follows:

> "(a) In any case, civil or criminal, in a circuit court of appeals, * * * it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, * * * to require by certiorari * * * that the cause be certified to the Supreme Court for determination by it * * *."

III.

The Questions Presented.

The questions presented by this petition are as follows:

1. Whether or not the decree of December 1, 1936 in the Foreclosure Cause constitutes an adjudication against Phoenix Finance Corporation of the several issues and controversies involved in the Supplemental and Ancillary Proceedings, to wit, the issues and controversies involved in the Supplemental and Ancillary Proceedings, to wit, the five pending Delaware lawsuits, the $50,000 mortgage of record in Allamakee County, Iowa, and Crawford County, Wisconsin, and the $50,000 note for which the same is security.

2. Whether a Trustee under a deed of trust securing a bond issue "represents" the bondholders (at least in absence of express authority), so as to permit an adjudication, in a proceeding to foreclose the deed of trust, of contractual obligations and claims (including counterclaims and set-offs) between a bondholder and the defendant in the foreclosure proceeding.

3. Whether in such a proceeding the involuntary impleading of a bondholder, a Delaware corporation, as a party plaintiff, (the defendant mortgagor being also a Delaware corporation), gives to the impleaded bondholder the status of an indispensable party against whom a valid adjudication may be made, and if it does, whether this has any effect upon the jurisdiction of the Federal Court because of lack of necessary diversity of citizenship.

4. Whether the issues in the Delaware Chancery action (see Summary Statement (b), 5) are wholly unrelated to and unidentified with any matter before the court in the Foreclosure Cause and, said issues involving questions of

the internal affairs of a Delaware corporation, whether the Court of Chancery of the State of Delaware does not have exclusive jurisdiction thereof.

5. Whether the decree of March 23, 1940 in the Supplemental and Ancillary Cause denying to Phoenix the right to enforce its several claims and to litigate the same in courts having jurisdiction of the parties and the subject matter (*i. e.*, the Delaware courts) constitutes a deprivation of the property and property rights of Phoenix in violation of Article V of the Amendments to the Constitution of the United States.

6. Whether or not Section 1 of Article IV of the Constitution of the United States requires full faith and credit to be given to the decree of December 1, 1936 in the Foreclosure Cause in so far as Phoenix is concerned, with respect to issues not involved in the Foreclosure Cause, where Phoenix was only a "formal" party to that cause.

7. Whether or not the decree and supporting opinion of the Circuit Court of Appeals for the Eighth Circuit or the judgment and supporting opinion (14 Atl. (2d) 386) of the Superior Court of Delaware (when and if affirmed by the Supreme Court of Delaware in the pending writ of error) is the applicable law of this case.

8. Whether or not the injunctions and mandatory orders against Phoenix in the decree of March 24, 1940 in the Supplemental and Ancillary Cause, whereby Phoenix is restrained, *inter alia*, from further prosecuting the pending Delaware actions, is ordered to dismiss the same at its cost, and is directed to satisfy the one judgment already obtained (14 Atl. (2d) 386) at its cost, violates Section 265 of the Federal Judicial Code and (the defense of *res adjudicata* being legally available and adequate) recognized principles of equity jurisprudence.

9. Whether or not by reason of the equitable maxim: "He who seeks equity must do equity," and the particular application thereof known as "Lord Redesdale's Rule," the Bridge Company by its bill of complaint *supplemental* and *ancillary* to the foreclosure decree was required to show that such decree was a "right" one and whether or not the petitioner as the defendant in said Supplemental and Ancillary Bill by its Answer and Counterclaim and by evidence in support thereof was entitled to show that the decree in said Foreclosure Cause should not be implemented.

10. Whether or not the decree of December 1, 1936 in said Foreclosure Cause is supplemented, enlarged and "pieced out" by the decree of March 24, 1940 in the Supplemental and Ancillary Cause.

11. Whether or not the District Court on the Supplemental and Ancillary Bill should have taken cognizance of the tendered proof of fraud inherent in its decree of December 1, 1936 in the Foreclosure Cause when such issue and proof were tendered by way of *defense* to a Supplemental and Ancillary Bill designed to implement and enlarge said foreclosure decree.

IV.

The Reasons Relied On for the Allowance of Writ of Certiorari.

In the exercise by the Supreme Court of its judicial discretion to grant the writ herein prayed, it is submitted by petitioner that there are special and important reasons therefor, to wit:

(a) That the Circuit Court of Appeals has decided important Federal questions, viz., the application of Section 1 of Article IV (the due process clause) of, and Article V of the Amendments (the full faith and credit clause) to,

the Constitution of the United States, in a way in conflict with the applicable decisions of this Court in that the Circuit Court of Appeals, affirming the District Court, held that the decree of December 1, 1936 in the Foreclosure Cause, as supplemented by the decree of affirmance thereof by the Circuit Court of Appeals and the mandate thereof, constitutes an adjudication against Phoenix of the several issues and controversies involved in the Supplemental and Ancillary Cause.

(b) That the Circuit Court of Appeals has affirmed a ruling by the District Court which, in effect, holds that the rights of Phoenix were adjudicated in a cause to which it was not an indispensable party, or represented (to the extent claimed) by an indispensable party, and in which cause the issues claimed to be adjudicated were not and could not have been involved if the District Court was to retain jurisdiction of the Foreclosure Cause.

(c) That in the respects mentioned in paragraphs (a) and (b), the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such departure by the District Court as to call for the exercise of this Court's power of supervision.

(d) That said decree is in conflict with applicable decisions of this Court in that the denial to Phoenix of the right to enforce its claims and to litigate the same in courts having jurisdiction of the parties and of the subject matter, constitutes a deprivation of the property rights of Phoenix Finance Corporation without due process of law, in violation of Article V of the Amendments to the Constitution of the United States, in violation of Section 265 of the Federal Judicial Code and in violation of recognized principles of Equity Jurisprudence.

(e) That the Circuit Court of Appeals in affirming the District Court has extended the "doctrine of representation" (*i.e.*, that Phoenix as a bondholder was represented by the Trustees in the Foreclosure Cause to the extent that an adjudication of its notes, claims, and contractual obligations against the mortgagor existing independently of the deed of trust and the bonds secured thereby, could validly be made) to a point not justified by the applicable decisions of this Court, in conflict with its own prior decisions, and in derogation of the constitutional rights of the petitioner.

(f) That in thus deciding, the Circuit Court of Appeals has established a precedent affecting the rights of bondholders everywhere, and which subjects them (whether or not they are in court as "formal" parties) to an adjudication of their property rights quite apart from the mortgage under foreclosure and without judiciable issues framed in pursuance of the usual and accepted course of judicial proceedings and the requirements of due process. The decision has far-reaching effects upon trustees everywhere and casts upon them new and unheard of duties and responsibilities in defending all underlying contract rights of their respective and numerous bondholders, incompatible with their purely fiduciary obligations.

(g) That in the event of an affirmance by the Supreme Court of Delaware of the judgment of the Superior Court in the pending writ of error involving the one case tried and determined between the parties in Delaware (see Foreword and Summary Statement (b), 1, p. 7, *supra*), there will be an unreconcilable conflict between the Circuit Court of Appeals for the Eighth Circuit and the Supreme Court of Delaware. Such conflict now exists as between the decree and supporting opinion of the Circuit Court of Appeals and the judgment and supporting opinion of the Superior

Court of Delaware. Accordingly, Phoenix is permitted to proceed with all the Delaware actions by the applicable decisional law of Delaware but is restrained from so proceeding by the Federal Court of the Eighth Judicial Circuit. This creates an intolerable situation so far as concerns the petitioner and its counsel. *It is pointed out that the decree below is of such purported effect as even to restrain Phoenix from defending the writ of error in the Supreme Court of Delaware and from appearing therein as defendant in error.*

(h) That the effect of the decree of the Circuit Court of Appeals affirming the District Court is to sanction a judgment on purely legal claims in a controversy between citizens of the same State in a Federal court, thereby exceeding the jurisdiction of the Federal court and so purporting to extend that jurisdiction as to call for the exercise by this Court of its power of review and supervision.

(i) That the Circuit Court of Appeals has decided an important question of Federal law, viz., whether the joinder by order of the District Court in the Foreclosure Cause of an involuntary party plaintiff, a citizen of the same State as the defendant, and a resulting adjudication of purely legal claims, unrelated to the issue of foreclosure, will oust Federal jurisdiction if previously existing. The decision is in conflict with decisions of the Circuit Court of Appeals of other circuits and presents a question which has not heretofore been, but should be, decided by this Court.

(j) The Circuit Court of Appeals has decided an important matter of local law, *i.e.*, the law of Iowa with respect to necessary parties in a suit attacking the mortgage for alleged invalidity of the indebtedness, in conflict with applicable decisions of the State of Iowa.

(k) The Circuit Court of Appeals has decided an important matter of local law, which is exclusively within the juris-

diction of the Court of Chancery of the State of Delaware, *i. e.*, a matter relating to the internal affairs of a Delaware corporation, and particularly the right of Phoenix, otherwise a stockholder of the Bridge Company, to have re-issued to it 517 shares of Bridge Company preferred stock acquired by the Bridge Company from Phoenix in violation of Delaware Law and its own charter provisions. In this respect, the decision of the Circuit Court of Appeals is in conflict with the statutory and decisional law of the State of Delaware.

(l) That the Circuit Court of Appeals has misinterpreted and misapplied the applicable decisions of this Court and of other circuits with respect to the equitable maxim: "He who seeks equity must do equity," and the particular application thereof known as "Lord Redesdale's Rule," in holding that the decree of December 1, 1936 in the Foreclosure Cause "is conclusively presumed to be correct" in a Supplemental and Ancillary Proceeding of this character; that the complainant in the Supplemental and Ancillary Proceeding is not required to show that the former decree is a "right" one; that the defendant in the Supplemental and Ancillary Proceeding may not show that the decree was induced by fraud, assumes facts not established by the record, and is otherwise "wrong"; and that the said Circuit Court of Appeals also failed to recognize (again misinterpreting and misapplying the applicable decisions of this Court and of other courts) that the decree affirmed by the Circuit Court of Appeals does in fact supplement, enlarge, and materially and substantially "piece out" the said decree of December 1, 1936.

(m) That the Circuit Court of Appeals has decided an important question of law at variance with the applicable decisions of this Court and of other circuits and the express limitations and exceptions of such decisions, viz., that the

Circuit Court of Appeals failed to recognize the distinction between a party *affirmatively* seeking to have a former decree set aside on the ground of fraud and a party *defending* against a suit to implement or enforce a fraudulent decree, and in failing to recognize such established distinction, held that Phoenix as a *defending* party was bound by the same rule as though it were *affirmatively* attacking said former decree.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals of the United States for the Eighth Judicial Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be named therein, a true and complete copy of the record and proceedings in the cause in said court, the same being numbered on its docket No. 11,734 and being entitled "Phoenix Finance Corporation, a corporation of the State of Delaware, Appellant, v. Iowa-Wisconsin Bridge Company, a corporation of the State of Delaware, Appellee", and that, upon consideration thereof, the decree of said Circuit Court of Appeals be reversed.

And your petitioner further respectfully prays that this Honorable Court withhold its ruling upon the within petition for writ of certiorari until the determination by the Supreme Court of the State of Delaware in that certain cause numbered on the docket of said Court No. 4 October Term 1940 and entitled "Iowa-Wisconsin Bridge Company, a corporation of the State of Delaware, Defendant below-plaintiff in error, vs. Phoenix Finance Corporation, a corporation of the State of Delaware, Plaintiff below-defendant in error;" that upon the determination of said cause in said Supreme Court of Delaware, your petitioner may be permitted to file with the Clerk of the Supreme Court not

less than ten certified copies of the opinion, decree and mandate of said Supreme Court of Delaware; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may appear meet and just.

And your petitioner, as in duty bound, will ever pray, etc.

PHOENIX FINANCE CORPORATION,
By JAMES R. MORFORD,
One of its Attorneys.

MARVEL & MORFORD,
ZIMMERMAN & NORMAN,
CASPER SCHENK,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

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PHOENIX FINANCE CORPORATION, A CORPORATION OF THE STATE OF DELAWARE,

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vs.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION OF THE STATE OF DELAWARE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the District Court of the United States for the Northern District of Iowa (not yet reported) on the Supplemental and Ancillary Bill appears at pages 717-719 of the Record. The opinion of the Circuit Court of Appeals for the Eighth Circuit (not yet reported) appears at pages 767-787 of the record.

The opinion of the Superior Court of Delaware in the case referred to in the petition (Foreword and Summary (b), 1, p. 7, *supra*) appears in 14 Atlantic (2d) 386.

Writ of error to Supreme Court of Delaware (No. 4, October Term, 1940) is pending, and argument will be regularly calendared for January Term, 1941. [16]

In the Foreclosure Cause, the opinion of the District Court appears in 19 Fed. Supp. 127 (F. R. 156, 208, 411), and of the Circuit Court of Appeals in 98 Fed. (2d) 416 (F. R. 1689-1709).

Jurisdiction.

Writ of certiorari is prayed pursuant to the authority of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C. A., Sec. 347 (a)).

The reasons relied on for the exercise by this Court of its judicial discretion under the above cited Section have been stated in sub-heading IV of the petition (pp. 14-19 *supra*).

Basically, there is involved in this petition the requested construction by the Supreme Court of the decree of December 1, 1936 in the Foreclosure Cause in the District Court (F. R. 156) as affirmed by the decree (F. R. 1709) and mandate (R. 697) of the Circuit Court of Appeals in that cause. The two major questions as to the effect of the foreclosure decree relate to: (1) the effect of that decree as an *adjudication* against Phoenix, an involuntarily impleaded party complainant, of Phoenix' legal claims on notes, contracts and open accounts, and Bridge Company's unpleaded counterclaims or set-offs with respect thereto, and (2) the right of Phoenix as the defendant in the Supplemental and Ancillary Cause, to challenge the Foreclosure decree under "Lord Redesdale's Rule."

Essentially, therefore, it is the petitioner's contention that the District Court in the Foreclosure Cause was with-

[16] See certificate of Clerk of Supreme Court of Delaware, *addendum* hereto.

out *jurisdiction* to adjudicate against it in a cause (1) where it was but a "formal" party (F. R. 211), and (2) where such purported adjudication was not responsive to issues tendered by the pleadings. The *construction* of the prior decree involving a determination of the scope of the jurisdiction of the court rendering the prior decree is a proper matter to be considered by the Supreme Court on writ of certiorari.

St. Louis, etc., Railroad Company v. *Wabash Railroad Company, etc.*, 217 U. S. 247, 30 S. Ct. 510, 54 L. Ed. 752;

Baltimore & Ohio R. R. v. *Parkersburg*, 268 U. S. 35;

KVOS, Inc. v. *Associated Press*, 299 U. S. 269.

The existing conflict between the Circuit Court of Appeals and the Superior Court of Delaware (and in the event of an affirmance on pending writ of error, the Supreme Court of Delaware) relating to the construction and legal effect of the decree of December 1, 1936, in the Foreclosure Cause, is another important consideration calling for the exercise of the discretionary jurisdiction of the Supreme Court.

Forsyth v. *Hammond*, 166 U. S. 506, 17 S. Ct. 665, 41 L. Ed. 1095.

Specifications of Error.

1. That the Circuit Court of Appeals for the Eighth Circuit erred in holding that the decree of December 1, 1936 in the Foreclosure Cause constituted an adjudication against Phoenix Finance Corporation of the several issues and controversies in the Supplemental and Ancillary Cause.

2. That said court erred in holding that the Trustee under a deed of trust securing a bond issue, in a proceeding to foreclose the deed of trust, "represents" the bondholder so as to permit an adjudication of contractual obligations and claims (including unpleaded counterclaims and set-

offs) between a bondholder and the defendant in the Foreclosure proceeding.

3. That said court erred in holding that in the Foreclosure Cause, the involuntary impleading of a bondholder, Phoenix Finance Corporation, a Delaware corporation, as party plaintiff (the defendant mortgagor being also a Delaware corporation) gave to such impleaded bondholder the status of an indispensable party against whom a valid adjudication on unpleaded issues may be made, and that said court further erred in failing to recognize that the result of its holding in this respect is such as to divest the Federal court of jurisdiction because of the absence of diversity of citizenship.

4. That said court erred in failing to consider the exclusive jurisdiction of the Court of Chancery of Delaware with respect to the Delaware Chancery action (see Summary Statement (b), 5) and the issues thereof as being unrelated to and unidentified with any matters before the court in the Foreclosure Cause.

5. That said court erred in so construing said decree of December 1, 1936 in the Foreclosure Cause as to deny to Phoenix the right to enforce its several claims in the Delaware courts, where jurisdiction of the parties and subject matter existed, and in so doing, denied to Phoenix due process, in violation of Article V of the amendments to the Constitution of the United States.

6. That said court erred in that the injunctions and mandatory orders against Phoenix involved in the decrees below, whereby Phoenix is restrained from further proceeding with the pending Delaware actions and is ordered to dismiss the same at its cost and to satisfy at its cost the judgment already obtained (in connection with which a writ of error to the Supreme Court of Delaware is pending), vio-

lated Section 265 of the Federal Judicial Code and general principles of Equity Jurisprudence (the defense of *res adjudicata* being available and asserted in the Delaware actions and being legally adequate).

7. That said court erred in holding that on the Supplemental and Ancillary Bill, the Bridge Company, complainant, was not required to show that the decree in the Foreclosure Cause was a "right" one and in holding that the defendant (the petitioner herein) was not entitled to show, in a proceeding *supplemental* as well as ancillary to the Foreclosure Cause, that such decree was the result of mutual mistake (on the procedural point) and fraud, and that the complainant in the Supplemental and Ancillary Bill had not "done equity" and was in court with "unclean hands."

8. That said court erred in failing to hold that the decree of December 1, 1936 in the Foreclosure Cause is supplemented, enlarged and "pieced out" by this decree in the Supplemental and Ancillary Cause, and that, therefore, under the decisions of this Court, the equitable principle known as "Lord Redesdale's Rule" is applicable.

9. That said court erred in failing to hold that the District Court should have taken cognizance in the Supplemental and Ancillary Cause of the tendered proof of fraud inherent in its decree in the Foreclosure Cause.

Statement of the Case.

The "Summary Statement of the Matter Involved" contained in the petition, *ante*, pp. 3-11, is a recital of such of the facts as are deemed necessary to apprise this Court of the nature of the case. Such statement is, of necessity, greatly condensed, and will, of course, be greatly amplified on final argument.

From the summary statement, the following factual points are emphasized:

(a) The Foreclosure Cause was typically one for the equitable foreclosure of a deed of trust securing a bond issue. The parties were the mortgagee (the Trustees) and the mortgagor (the Bridge Company).

(b) Phoenix Finance Corporation was a bondholder. There were no pleaded issues in the suit involving it. It was brought in involuntarily as a party plaintiff.

(c) Both the District Court and Circuit Court of Appeals in the Foreclosure Cause held Phoenix Finance Corporation to be but a "formal" party, and the Trustees the only "indispensable" party (F. R. 211; 19 Fed. Sup. at p. 142; F. R. 1692; 98 Fed. (2d) at p. 420).

(d) Phoenix Finance Corporation did not participate in the trial in the Foreclosure Cause and offered no evidence. This was not strictly a default or oversight but a procedural matter understood by all the parties and the Master, *i. e.*, that proof of validity of and consideration for all outstanding bonds was reserved for a "second stage" of the same proceeding.

(e) The first affirmative step by Phoenix Finance Corporation was to petition for a rehearing after the decree. This was refused because of a mistake of the District Court induced by the deliberate misrepresentation by counsel for the intervener, Kendrick, and other fraudulent tactics on the part of said counsel, his associate, and one of the interveners (R. 166, 167, 223, 256, 275-292).

(f) Phoenix Finance Corporation has brought the ultimate facts stated in (3) to the attention of the court in every proper way and on every available opportunity.

(g) In each of the Delaware cases, the Bridge Company has appeared generally and, along with other defenses, has

pleaded *res adjudicata* based upon the supposed effect of the decree in the Foreclosure Cause. The Bridge Company tried one of the Delaware cases before the filing of the Supplemental and Ancillary Bill upon the sole issue of *res adjudicata*, and the Delaware Superior Court (by written opinion of two Supreme Court Judges, 14 Atl. (2d) 386) overruled the plea and gave judgment.

(h) The Delaware Chancery case (see Summary Statement (b), 5, page 8, *supra*) involves the sole issue that the Bridge Company acquired its own stock in violation of the Delaware Corporation Law [17] and of its charter provisions.[18]

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[17] 2051 Section 19 of the Revised Code of Delaware. This Section provides:

"Every corporation organized under this Chapter shall have the power to purchase, hold, sell and transfer shares of its own capital stock; *provided that no such corporation shall use its funds or property for the purchase of its own shares of capital stock when such use would cause any impairment of the capital of the corporation;* and provided further that shares of its own capital stock belonging to the corporation shall not be voted upon directly or indirectly; and provided, further, that nothing in this Section shall be construed as limiting the exercise of the rights given by Section 27 of this Chapter." (Emphasis supplied.)

[18] The following clauses appear in the Bridge Company's charter (F. R. 1640, 1645):

"To purchase, hold, sell and transfer the shares of its own capital stock; *provided it shall not use its funds or property for the purchase of its own shares of capital stock when such use would cause any impairment of its capital;* and provided further that shares of its own capital stock belonging to it shall not be voted upon directly or indirectly.

The preferred stock may be redeemed in whole or in part on any dividend date at the option of the corporation to be exercised by its Board of Directors at One Hundred Ten Dollars ($110) a share and accrued dividends.

If less than all shares of preferred stock are to be redeemed, the shares to be redeemed shall be selected by lot or pro rata, as the Board of Directors may determine. Notice of the intention of the corporation to redeem shares of preferred stock shall be mailed at least thirty (30) days before the date of redemption to each holder of record of the shares to be redeemed, at his last known post office address as shown by the corporation's records. At any time after such notice has been

ARGUMENT.

Summary of Argument.

1. The decree of December 1, 1936, in the Foreclosure Cause as supplemented by the decree of affirmance of the Circuit Court of Appeals and the mandate thereof does not constitute an adjudication against Phoenix of the several issues and controversies involved in the Supplemental and Ancillary Proceedings because:

(a) Phoenix was only a "formal" party to that proceeding,

(b) Phoenix was not "represented" by the Trustees to an extent to put in issue (even if pleaded) the underlying obligations of the Bridge Company to Phoenix on contracts, notes and open accounts,

(c) There were no issues framed in the Foreclosure Cause involving Phoenix and no issues framed in the cause as to any party justifying an adjudication against Phoenix of the issues raised by the Supplemental and Ancillary Bill.

2. If the decree of December 1, 1936, in the Foreclosure Cause did constitute an adjudication of such issues against Phoenix, Phoenix must necessarily have had the status of "indispensable" party, and those issues involving legal

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mailed as aforesaid, the corporation may deposit the aggregate redemption price with any bank or trust company in the City of Lansing, Iowa, named in such notice, payable in the amounts aforesaid to the respective holders of the shares to be redeemed, on endorsement and surrender of their certificates, and thereupon such holders shall cease to be stockholders with respect to said shares, and from and after the making of such deposit said holders shall have no interest in or claim against the corporation with respect to such shares and shall be entitled only to receive said monies from said bank or trust company without interest. The corporation may also purchase shares for redemption at not exceeding the redemption price above specified.

Any preferred stock redeemed or purchased for redemption under any provision hereof, or otherwise, shall be cancelled and not reissued." (Emphasis supplied.)

claims with Phoenix, a Delaware corporation, as the plaintiff, and the Bridge Company, a Delaware corporation, as the defendant, the Federal Court had no jurisdiction thereof.

3. A construction of the decree of December 1, 1936, as denying to Phoenix the right to enforce its claims and to litigate the same in courts having jurisdiction of the parties and of the subject matter, constitutes a deprivation of the property and property rights of Phoenix, in violation of Article V of the Amendments to the Constitution of the United States.

4. The injunction against Phoenix from prosecuting the Delaware actions violates Section 265 of the Federal Judicial Code as well as principles of General Equity Jurisprudence.

5. The Delaware Court of Chancery has exclusive jurisdiction to hear and determine the issues involved in the proceeding in that Court (Summary Statement (b) 5).

6. By reason of the equitable maxim: "He who seeks equity must do equity," and the particular application thereof known as "Lord Redesdale's Rule," the Bridge Company by its bill of complaint supplemental and ancillary to the Foreclosure Decree was required to show that such decree was a "right" one, and Phoenix by its answer and counterclaim and by evidence in support thereof was entitled to show that such decree should not be implemented.

7. The scope of the decree in the Supplemental and Ancillary Proceeding is broader than the decree in the Foreclosure Cause and in effect substantially "pieces out" that decree. The case is a typical one for the application of "Lord Redesdale's Rule."

8. The District Court in the Supplemental and Ancillary Proceedings should, when raised by way of defense, have

taken cognizance of the tendered proof of fraud inherent in its own decree.

Point I.

The decree of December 1, 1936, *in the Foreclosure Cause as supplemented by the decree of affirmance of the Circuit Court of Appeals and the mandate thereof does not constitute an adjudication against Phoenix of the several issues and controversies involved in the Supplemental and Ancillary Proceedings because* • • •

(a) Phoenix was only a "formal" party to that proceeding.

The District Court in the Foreclosure Cause held that "the trustees were the only indispensable parties plaintiff, had *exclusive control of the litigation,*" and that Phoenix "was merely a formal and not an indispensable" party (F. R. 211; 19 Fed. Sup. at p. 142). In the Circuit Court of Appeals, it was held (F. R. 1692; 98 Fed. (2d) at p. 420) that "it is apparent that the Trustees are the only necessary and indispensable parties plaintiff.

The Supreme Court of the United States has divided parties into three classes, viz., (1) formal, (2) necessary but not indispensable, and (3) indispensable.

Shields v. *Barrow*, 17 How. 130, 15 L. Ed. 158;

Williams v. *Bankhead*, 19 Wall. 563, 22 L. Ed. 184;

Waterman v. *The Canal-Louisiana Bank etc. Co., Executor*, 215 U. S. 33, 30 S. Ct. 10, 54 L. Ed. 80;

Minnesota v. *Northern Securities Co.*, 184 U. S. 199, 22 S. Ct. 308, 46 L. Ed. 499.

The criterion by which to determine when one is a mere "formal" or "nominal" party is whether or not a decree is sought against it.

Payne v. *Hook*, 7 Wall. 425, 19 L. Ed. 260;

Union Bank of Louisiana v. *Stafford*, 12 How. 327, 13 L. Ed. 1008;

Wormley v. *Wormley*, 8 Wheat. 421, 5 L. Ed. 651;
Niles-Bement-Pond Co. v. *Iron Moulders Union &c.*, 254 U. S. 77, 41 Sup. Ct. 39, 65 L. Ed. 145;
Horn v. *Lockhart*, 17 Wall. 570, 21 L. Ed. 657.

No decree was sought or rendered against Phoenix in the Foreclosure Cause.

(b) Phoenix was not "represented" by the Trustees to an extent to put in issue (even if pleaded) the underlying obligations of the Bridge Company to Phoenix on contracts, notes and open accounts.

The Delaware Superior Court in the one case fully tried between the parties and involving, as the sole issue, the defense of *res adjudicata* arising from the decree in the Foreclosure Cause said (*Phoenix Finance Corporation* v. *Iowa-Wisconsin Bridge Company*, 14 A. (2d) 386, 389):

"We think that in a suit to foreclose a mortgage securing a bond issue the doctrine of representation of the bondholders by the Trustee means that the Trustee represents all bondholders in all things relating to their common or individual interest in the trust of property, or in the bonds, but that such representation does not extend beyond a consideration of the trust property, or of the bonds secured thereby. The Trustee cannot, by implication, be held to represent the bondholders beyond the terms of the instrument under which, alone, the Trustees have their origin of existence. The subject matter upon which the representation would apply must be one as to which both the Trustee and the person represented have an interest. In this case we are not directly concerned with the question as to whether the representation of a bondholder by a Trustee includes an inquiry as to the validity of the bonds themselves, or at what stage of the proceedings such inquiry should be had. No such question is here presented, for we are in no way interested in the bonds, as such.

The foregoing conclusion is not, we think, in any way inconsistent with Kerrison v. Stewart, 3 Otto. 155, 23 L. Ed. 843; Mercantile Trust Co. v. Schlafly, 8 Cir. 299 F. 202; Richter v. Jerome, 123 U. S. 233, 8 S. Ct. 106, 31 L. Ed. 132; Beals v. Illinois, etc., R. R. Co., 133 U. S. 290, 10 S. Ct. 311, 33 L. Ed. 608; or Elwell v. Fosdick, 134 U. S. 500, 10 S. Ct. 598, 33 L. Ed. 998." (Emphasis supplied.)

The foregoing succinctly states petitioner's contention. The decrees below are to a contrary effect.

The doctrine of representation is confined to the subject of the trust. The Trustees represent the bondholder and in things "*relating to their common interest in the trust property.*"

Kerrison v. *Stewart, supra;*
Central Tr. Co. v. *California & N. R. Co.*, 110 Fed. 70.

The Trustee is a special, not a general, agent of the bondholders and is limited to the legitimate purposes of the relation he sustains to the security and the parties entitled to the benefit thereof.

Mackay v. *Randolph Macon Coal Co. et al.*, 178 Fed. 881 (C. C. A. 8th);

Moran v. *Hagerman*, 64 Fed. 499 (C. C. A. 9th);

Harrisburg & Eastern R. Co.'s Appeal, 1 Mona. (Pa.) 692, 15 A. 459, 1 L. R. A. 230 (citing Supreme Court cases);

Iowa Title & Loan Co. v. *Clark Bros. et al.*, 213 Iowa 875, 237 N. W. 336;

Fonda J. & G. R. Co. v. *New York Trust Company*, 233 App. Div. 443, 254 N. Y. S. 266;

Short on Railroad Bonds and Mortgages, Secs. 274, 497.

The Iowa cases are particularly applicable because the Foreclosure Cause concerned the foreclosure in the Federal

Court in Iowa of a deed of trust on Iowa property. It is well established that rules of substantive law of the state are controlling on the Federal courts.

Erie R. R. v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188;
Ruhlin v. *N. Y. Life Ins. Co.*, 304 U. S. 202, 82 L. Ed. 1290.

In Iowa, it is held that the holder of the indebtedness secured by a mortgage is a "necessary" party to a suit attacking the mortgage for invalidity of the indebtedness.

Clemons v. *Elder*, 9 Iowa 272.

See also:

Iowa Title & Loan Co. v. *Clark Bros. et al.*, 213 Iowa 875, 237 N. W. 336.

This is incompatible with the bondholder's appearance in the case by "representation" only.

The principle for which petitioner contends is also well stated in the Eighth Circuit case of *Toucey* v. *New York Life Ins. Co.*, 102 Fed. (2d) 16, 19, as follows:

> "The illustration of the rule is where it is made to appear in an equity suit brought to foreclose a mortgage or other lien that there is in fact no valid lien to enforce in equity. *In such cases the equity court may not proceed to adjudicate a claim of legal liability upon a promissory note or upon a purely legal obligation unrelated to equitable liens.* In such cases, the legal controversy presented is independent and distinct." (Emphasis supplied.)

(c) There were no issues in the Foreclosure Cause involving Phoenix and no issues framed in the cause as to any party justifying an adjudication against Phoenix of the issues raised by the Supplemental and Ancillary Bill.

An adjudication to be valid (apart from the question of parties) must be within the issues as defined by the pleadings.

Reynolds et al. v. *Stockton, Receiver,* 140 U. S. 254, 35 L. Ed. 464;

Southern Pacific R. Co. v. *U. S.,* 168 U. S. 1, 42 L. Ed. 355, 377;

Baltimore Steamship Co. v. *Phillips,* 274 U. S. 316, 319, 71 L. Ed. 1069, 1071;

Duchess of Kingston's Case, 1 Leach 146, 168 Eng. Repr. 175; 2 Smith's Lead. Cas. (12th ed.) 754.

In the Eighth Circuit, it was stated in the case of *Union Central Life Ins. Co., etc.* v. *Drake,* 214 Fed. 536, 545:

> "But there was no pleading of or prayer for a subrogation of the insurance company to the rights of the first mortgagee to his liens upon the three forties, *and evidence without pleading is as futile to sustain an adjudication of an issue as pleading without proof.*" (Emphasis supplied.)

See also:

Cromwell v. *County of Sac,* 94 U. S. 351, 24 L. Ed. 195;

Landon v. *Clark,* 221 Fed. 841;

Yost v. *Yost,* (Ct. of App. Md. 1937) 190 A. 753;

Lewis' & Nelson's Appeal, 67 Pa. 153;

Smith v. *Rountree,* 185 Ill. 219, 56 N. E. 1130;

Kicinko et al. v. *Petruska et al.,* 259 Pa. 1, 102 Atl. 286, 288;

1 Freeman on Judgments, 5th ed., Sec. 37, p. 674.

Point II.

If the decree of December 1, 1936 in the Foreclosure Cause did constitute an adjudication of such issues against Phoenix, Phoenix must necessarily have had the status of "indispensable" party, and those issues involving legal

claims with Phoenix, a Delaware Corporation, as the plaintiff and the Bridge Company, a Delaware corporation, as the defendant, the Federal Court had no jurisdiction thereof.

Under this heading, it is assumed *arguendo,* as the Court below held, that there *was* a valid adjudication against Phoenix, a Delaware corporation, with respect to legal and equitable issues. With such issues we must regard Phoenix as the party plaintiff (or defendant to any counterclaim or set-off) and the Bridge Company, another Delaware corporation, as the party defendant (or plaintiff to any counterclaim or set-off). It is true that these things were not involved in the issue of mortgage foreclosure, but the Court has said that these issues were decided. How does this affect Federal jurisdiction?

Phoenix must of necessity have been an "indispensable" party for there to have been an adjudication against it on any issue involved in the Supplemental and Ancillary Bill.

This Court said in *Robinson v. Anderson,* 121 U. S. 522, 524:

> "Even if the complaint, standing by itself, made out a case of jurisdiction * * * it was taken away as soon as the answers were in, because if there was jurisdiction at all it was by reason of the averments in the complaint * * *; and these were of no avail as soon as the answers were filed * * *."

To the same effect are:

Lambert Run Coal Co. v. *Baltimore & Ohio R. Co.,* 258 U. S. 377, 383;

Boston, etc., Mining Co. v. *Montana Ore Purchasing Co.,* 188 U. S. 632, 643;

Helm v. *Zarecor,* 222 U. S. 32, 36;

Florida Central, etc., R. Co. v. *Bell,* 176 U. S. 321, 330.

The Constitution limits Federal jurisdiction to "controversies * * * between citizens of different states."

Article III, Section 2, Amendment X. If we may assume that the Court in the Foreclosure Cause only decided issues properly raised, there existed a "controversy (vital to the entire case, but between citizens of Delaware) which had taken shape for judicial decision."

Florida v. *Georgia*, 58 U S. (17 How.) 478, 525;
Harrison v. *Harrison, et al.*, 5 F. (2d) 1001, 1003.

> "The intent of Congress drastically to restrict Federal jurisdiction in controversies between citizens of different states has always been rigorously enforced by the courts."
>
> *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 288.

> "Even an appellate court must notice the absence of the elements requisite to original jurisdiction * * *."
>
> *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 288.

And see *U. S. et al.* v. *Corrick*, 298 U. S. 435, 440; *Williams* v. *Nottawa*, 104 U. S. 209; *McNutt* v. *General Motors Acceptance Corporation*, 298 U. S. 178, 184.

> "Diverse state citizenship of the parties * * * is absolutely essential, and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed."
>
> *Chicago, B. & Q. Ry. Co.* v. *Willard*, 220 U. S. 413, 420.

See also:

> *M. C. & L. M. Ry. Co.* v. *Swan*, 111 U. S. 379, 382.

The decision in the Foreclosure Cause (contrary to the decree in the Supplemental and Ancillary Cause) assumes that Phoenix was not an indispensable party to the suit. In this respect, that decision was in conflict with the decisions of the Supreme Court of Iowa if we are also to assume that Phoenix (not Phoenix Finance System, Inc.) was

charged with fraud invalidating both the Deed of Trust and the bonds. In a suit to cancel a mortgage, the Iowa Court has held that all beneficiaries interested in the mortgage debt must be made parties.

Clemons v. *Elder, et al.*, 9 Iowa 272, 275.

The answer in the case at bar demanded cancellation both of the mortgage and of the bonds. In a suit in equity to invalidate a written instrument alleged to be fraudulent, the Iowa decisions hold all parties to it must before the court.

Miller, et al., v. *Mahaffy, et al.*, 45 Iowa 289.

> "The Federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the state unwritten as well as written."
>
> *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 73.

> "The doctrine applies though the question * * * arises not in an action at law, but in a suit in equity."
>
> *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, 205.

The decision below is in conflict with the decisions of this Court.

In *Shields* v. *Barrow*, 58 U. S. (17 How.) 130, this Court found absence of original jurisdiction after thirteen years of litigation in the lower Federal courts (p. 146). There, as here, it was sought to invalidate a contract, one of the parties to which was of the same state as the party raising the controversy. It was held that "a bill to rescind a contract presents an example" of indispensable parties (p. 139). The presence of each party to the contract is a prerequisite to equity jurisdiction. Equity could make no decree without them. And if, by joinder, one destroyed diversity of citizenship, it ousted jurisdiction of the Federal courts.

To the same effect is *Ribon* v. *R. R. Companies*, 83 U. S. (16 Wall.) 446, 450, holding that where "the interests of those present and those absent are inseparable, the obstacle is insuperable."

See also:

Northern Indiana R. Co. v. *Michigan Central R. Co.*, 55 U. S. (15 How.) 233, 245.

In *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 246, 247, this Court said:

> "When it appears to a court of equity that a case, otherwise presenting ground for its action, cannot be dealt with because of the absence of essential parties, it is usual for the Court, while sustaining the objection, to grant leave to the complainant to amend by bringing in such parties. But when it likewise appears that necessary and indispensable parties are beyond the reach of the jurisdiction of the court, or that, when made parties, the jurisdiction of the court will thereby be defeated, for the court to grant leave to amend would be useless. Sec. 2 of Article 3 of the Constitution of the United States."

See also:

Gregory v. *Stetson*, 133 U. S. 579, 587;
Niles-Bement Pond Co. v. *Iron Moulders Union*, 254 U. S. 77, 82;
Trimble v. *Winston Co.*, 56 F. (2d) 150 (C. C. A. 5).

In *Swan Land & Cattle Co.* v. *Frank*, 148 U. S. 603, 610, this Court said:

> "Now, it is too clear to admit of discussion that the various corporations charged with the fraud • • • are necessary and indispensable parties to any suit to establish the alleged fraud • • •."

See also:

Gaylor v. *Kelshaw*, 68 U. S. (1 Wal.) 81, 82;
Nougue v. *Clapp*, 101 U. S 551, 553;
Garzot v. *De Rubio*, 209 U. S. 283, 297
Hill v. *Wilson*, 210 Fed. 200 (C. C. A. 5).

The Judicial Code, Section 37, as amended, imposes a duty upon the Federal courts to dismiss any suit when it appears from the pleadings or the proofs "that such suit does not really and substantially involve a suit or controversy properly within the jurisdiction of said court," as defined by the Constitution and further limited by statute.

Jurisdiction cannot be waived by the parties, and, since the Act of March 3, 1875, the record on jurisdiction will be scanned by the Court *sua sponte*. *Chicago, B. & Q. Ry. Co.* v. *Willard*, 220 U. S. 413, 420. Where clear error, appearing on the face of the record, has occurred in the decision of the Court below on a question of Federal jurisdiction and procedure, the matter is of such importance as to require a review in certiorari to correct it.

George v. *Victor Talking Machine Co.*, 293 U. S. 377, 379;

United States v. *Corrick*, 298 U. S. 435, 440;

Mitchell v. *Maurer*, 293 U. S. 237, 244;

McNutt v. *General Motors Acceptance Corp.*, 298 U. S. 178, 184.

Point III.

A construction of the Decree of December 1, 1936 as denying to Phoenix the right to enforce its claims and to litigate the same in courts having jurisdiction of the parties and of the subject matter, constitutes a deprivation of the property and property rights of Phoenix, in violation of Article V of the Amendments to the Constitution of the United States.

The Fifth Amendment to the Constitution of the United States is in part as follows:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Judicial Department of the Federal Government is necessarily governed in the exercise of its functions by the rule of due process in the Fifth Amendment.

Hovey v. *Elliott*, 167 U. S. 409, 17 S. Ct. 841, 42 L. Ed. 215.

In judicial proceedings, due process of law must be a course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. It must be one that is appropriate to the case and just to the parties affected. It must be pursued in the ordinary manner prescribed by the law. It must give to the parties to be affected an opportunity to be heard respecting the justice of the judgment sought. It must be one which hears before it condemns, proceeds upon inquiry, and renders judgment only after trial.

Hurtado v. *California*, 110 U. S. 516, 4 S. Ct. 111, 28 L. Ed. 232;

Murray v. *Hoboken Land &c. Co.*, 18 How. 272, 15 L. Ed. 372;

Burton v. *Platter*, 53 F. 901;

Thomas v. *District of Columbia*, 90 F. (2d) 424, 67 App. D. C. 179;

Albion-Idaho Land Co. v. *Naf. Irr. Co.*, 97 F. (2d) 439, 444.

Judgments are conclusive only as to parties and their privies but even parties and privies are bound only so far as regards the subject-matter then involved.

1 Cooley's Constitutional Limitations (8th ed.) p. 112.

Thus if certain facts were not necessarily included in the issue, a party is not concluded by the judgment as to them.

Doonan v. *Glynn*, 28 W. Va. 715;

Lorillard v. *Clyde*, 99 N. Y. 196, 1 N. E. 614;

City of Rushville v. *Rushville National Gas Co.*, 164 Ind. 162, 73 N. E. 87, 3 Ann. Cas. 86.

As stated in the case of *Bates* v. *Bodie*, 245 U. S. 520, 38 Sup. Ct. 182, 62 L. Ed. 444, L. R. A. 1918C, 359:

> "And this court has established a test of the thing adjudged and the extent of its estoppel. It is: If the second action is upon the same claim or demand as that in which the judgment pleaded was rendered, the judgment is an absolute bar not only of what was decided, but of what might have been decided. If the second action was upon a different claim or demand, then the judgment is an estoppel 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' " (citing cases)

If there has been "due process" with respect to a given issue, a decree or judgment on that issue is a complete estoppel. On the other hand, if "due process" as thus defined and applied has not existed, there is no estoppel and a defense of *res adjudicata* in a later suit must of necessity fall.

Point IV.

The Injunction against Phoenix from prosecuting the Delaware actions violates Section 265 of the Federal Judicial Code as well as principles of general Equity Jurisprudence.

Section 265 of the Judicial Code provides:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

A restraint against a party offends against the Section to the same extent as an injunction formally directed against the State Court itself.

Oklahoma Packing Company v. *Oklahoma Gas & Electric Co.* 309 U. S. 4; 60 S. Ct. 215; 84 L. Ed. 329 and cases cited.

Certain exceptions to the rule are enumerated by the Eighth Circuit Court of Appeals in the case of *Equitable Life Assr. Society* v. *Wert*, 102 F. (2d) 10, 14. None of the exceptions therein stated are applicable to the facts here.

Even where the Federal Court has property in its possession, there are limits to the exercise of its power to enjoin. In *Guardian Trust Co.* v. *Kansas City Southern Railway Co.* (C. C. A. 8), 171 Fed. 43, 50, it was stated:

> "• • • the unquestioned rule that the pendency in a state or other court of an action *in personam* which involves no claim to or lien upon specific property in the possession or under the dominion of a national court of equity, and no issue of which that court has acquired exclusive jurisdiction, presents no ground for a dependent bill to stay it." (citing cases).

In the Chancery and law actions in Delaware, no relief is asked "affecting the control, possession or disposition of the res," now in the possession of the receiver of the District Court. No liens, claims or charges against the property are asserted. All the Delaware proceedings are *in personam* only.

Apart from the application of the foregoing Section of the Judicial Code, the decree enjoining Phoenix from prosecuting the Delaware State Court actions was erroneous on well-recognized principles of equity jurisdiction.

High on Injunctions, Sec. 89, succinctly states the rule:

> "The most frequent ground for refusing relief by injunction against a suit at law is that the defense

urged may be used in the action at law itself, without resort to equity. And it may be laid down as a general rule that legal proceedings will not be enjoined on grounds of which the person aggrieved may avail himself in defense of the action at law."

The rule thus stated has the judicial sanction of the Supreme Court:

Creath's Admr. v. *Sims,* 5 How. 191, 12 L. Ed. 111;
Hendrickson v. *Hinckley,* 17 How. 443, 445, 15 L. Ed. 123;
Marine Ins. Co. v. *Hodgson,* 7 Cranch. 332, 3 L. Ed. 362;
Phillips v. *Negley,* 117 U. S. 665, 29 L. Ed. 1013, 6 Sup. Ct. 901;
Knox County v. *Harshman,* 133 U. S. 152, 33 L. Ed. 586, 10 Sup. Ct. 257;
Deweese v. *Reinhard,* 165 U. S. 386, 41 L. Ed. 757, 17 Sup. Ct. 340;
Truly v. *Wanzer,* 46 U. S. (5 How.) 141, 12 L. Ed. 88;
Scottish U. & N. Ins. Co. v. *Bowland,* 196 U. S. 611, 49 L. Ed. 619, 25 Sup. Ct. 345.

See also:

5 *Pomeroy's Equity Jurisprudence* (4th ed.) Sec. 2059, pp. 4650-4651, and other cases cited.

In the Delaware cases, the Bridge Company not only has available the legal defense of *res adjudicata,* but in each case it has appeared generally and has formally pleaded that defense. In the $3,125-$2,000 notes case (Defendant's Exhibit S. C. 101, R. 385, Summary Statement (b) 1, p. 7, *supra*), it formally pleaded this defense (R. 422), it offered evidence in support thereof, and through its counsel briefed and argued it. The opinion of the court deals solely with that defense (14 Atl. (2d) 386).

Point V.

The Delaware Court of Chancery has Exclusive Jurisdiction to hear and determine the issues involved in the proceeding in that court (Summary Statement (b) 5).

In the Delaware Chancery cause, Phoenix is not suing to recover the stock because of the invalidating of the bonds received therefor. *Phoenix is seeking to recover the stock because there was an impairment of Bridge Company capital at the time of the purchase by it of its own stock, and because of the violation of charter provisions.*

Phoenix has tendered in the Delaware action the bonds received for the stock. The Bridge Company is defending upon the doctrine of estoppel or *res adjudicata.*

Because both corporations are domiciled in Delaware, no Federal Court has or can have jurisdiction. This is a matter relating peculiarly to the internal affairs of a Delaware corporation.

2105 Section 73 of the Revised Code of Delaware, 1935, provides:

> "For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this Chapter or otherwise, shall be regarded as in this State."

This Section has been construed in the following cases:

Wightman v. *San Francisco Bay Toll Bridge Co.*, 16 Del. Ch. 200, 142 A. 783;

Hunt v. *Drug, Inc.*, 5 W. W. Harr. 332 (Del.), 156 A. 384;

Bouree v. *Trust Francais*, 14 Del. Ch. 332, 127 A. 56;

Rojas-Adam Corp. v. *Young*, 13 F. (2d) 988;

Hodgman v. *Atlantic Refining Co.*, 274 Fed. 104;
Kling v. *McTarnahan* (Mass. 1931), 178 N. E. 831;
O'Hara v. *Frenkil* (Md. 1928), 155 Md. 189, 141 A. 528.

Only in the State of Delaware can jurisdiction be obtained for an action involving the internal affairs of a Delaware corporation. Where the act complained of affects the complainant solely in his capacity as a stockholder and is the act of the corporation, the same concerns the internal affairs of the corporation and the courts of a jurisdiction foreign to the state of incorporation (State or Federal) will not take jurisdiction even though the tangible property of the corporation be situate therein.

Kansas &c. Const. Co. v. *Topeka S. & W. R. Co.*, 135 Mass. 34, 46 Am. Rep. 437;
17 Fletcher's Cyclopedia on Private Corporations (1933), p. 396.

In *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, 130, 77 L. Ed. 652, 656, the Supreme Court said:

> "It has long been settled doctrine that a court—State or Federal—sitting in one State will as a general rule decline to interfere with or control by injunction or otherwise the management of the internal affairs of a corporation organized under the laws of another State but will leave controversies as to such matters to the courts of the State of the domicile."

See also:

Alm v. *American Hair & Felt Co.*, 91 F. (2d) 354 (C. C. A. 7);
Swift v. *Richardson*, 7 Houst. 338, 6 A. 856;
Mau v. *Montana-Pacific Oil Co. et al.*, 16 Del. Ch. 114, 141 A. 828;
In re *Fryeburg Water Co. (N. H.)*, 106 A. 225;
Kimball v. *St. Louis & S. F. R. Co.*, 157 Mass. 7, 31 N. E. 697;
Jackson v. *Hooper*, 76 N. J. Eq. 592, 604, 75 A. 568; 27 L. R. A. (N. S.) 658.

The Supreme Court of Michigan in the recent case of *Wojtczak* v. *American United Life Ins. Co.*, 292 N. W. 364 (June 3, 1940) reviewed the authorities including many of the foregoing on this point and quoted with approval from *Rogers* v. *Guaranty Trust Co., supra.*

The application of the principle above enunciated to the facts of the case *sub judice* is clear. In the Delaware Chancery action, Phoenix is complaining of an act which affects it solely in its capacity as a stockholder of the Bridge Company. The act complained of, viz., a transaction in violation of the corporate charter and of the Delaware statutes, is the act of the Bridge Company through its board of directors.

Point VI.

By reason of the equitable maxim: "He who seeks equity must do equity," and the particular application thereof known as "Lord Redesdale's Rule," the Bridge Company by its bill of complaint supplemental and ancillary to the foreclosure decree was required to show that such decree was a "right" one and Phoenix by its answer and counterclaim and by evidence in support thereof was entitled to show that such decree should not be implemented.

The Supplemental and Ancillary Bill seeks to enjoin, and the decrees below do in fact enjoin, Phoenix from asserting certain *bona fide* claims. These claims are all parcel of a general account between the parties shown with great certainty and clarity by defendant's rejected Exhibit S. C. 114 (R. 595-693). Those claims are further explained by paragraphs 17 to 38 of the Answer and Counterclaim of Phoenix (R. 153-164 stricken by the District Court) (R. 171). By its Supplemental and Ancillary Bill, it is the Bridge Company that is now "seeking equity."

The general principle underlying the maxim is of such universal recognition that it need not be again stated. See

Thomas Tr. v. *Brownville, &c., R. Co. et al.*, 109 U. S. 522, 27 L. Ed. 1018.

In the case of *Union Central Life Ins., &c., Co.* v. *Drake*, 214 Fed. 536, 548 (C. C. A. 8th), the court said (p. 548):

> "* * * A court of equity may always require him who seeks equity to do equity, and in a case in which the rules and principles of equity demand it, as they do in the case at bar, it may condition the grant of relief sough from it by a plaintiff with the enforcement of a claim or an equity held by a defendant which by reason of the statute of limitations or a former judgment the latter could not enforce affirmatively or in any other way. Pomeroy's Equity Juris. Secs. 386, 393, note 4; Brent *v.* Bank of Washington, 10 Pet. 596, 9 L. Ed. 547: Farmers' Loan & Trust Co. *v.* Denver, L. & G. R. Co., 126 Fed. 46, 51, 52, 60 C. C. A. 588, 593, 594, and cases there cited and reviewed; Central Improvement Co. *v.* Cambria Steel Co., 201 Fed. 811, 824, 120 C. C. A., 121, 135."

In the same circuit, see also:
Levy v. *S. H. Kress & Co.*, 285 Fed. 836, 839 (1922), 296 Fed. 697;
U. S. v. *Debell*, 227 Fed. 775, 779 (1915).

In the application of the maxim as a defense to the relief prayed, this case is governed by a rule, universally recognized and commonly referred to as "Lord Redesdale's Rule," in tribute to the statement of the rule by that famous Chancellor (author of Mitford's Chancery Pleadings) in *Hamilton* v. *Houghton*, 2 Bligh. 169, 4 Eng. Rep. 290:

> "The party who comes into a court of equity to have the benefit of a former decree must show that it was a right decree, if the decree appears to be erroneous, the Court cannot carry it into execution."

The rule is stated in even more emphatic form by Lord Chancellor Sugden in O'Connell v. M'Namara, 3 Dr. & War. 411.

The rule has received unquestioned recognition in the Supreme Court—

Lawrence Mfg. Co. v. *Janesville Cotton Mills*, 138 U. S. 552, 34 L. Ed. 1005;

O'Brien v. *Wheelock*, 184 U. S. 450, 46 L. Ed. 638;

Lewers & Cooke v. *Atcherly*, 222 U. S. 285, 56 L. Ed. 202 (1911).

It is submitted that on the Supplemental and Ancillary Bill, the Bridge Company was required to show that the decree in the Foreclosure Cause was a "right" one and Phoenix was entitled to show the contrary. Phoenix was also entitled to show circumstances of fraud and mutual mistake contributing to making that decree capable of implementation. In addition, Phoenix and its predecessors in interest had advanced large sums to the Bridge Company or for its benefit and the money so advanced remains unpaid. Under these same authorities, the court below should have compelled the Bridge Company to do equity and to repay to Phoenix the sum by which it has been unjustly enriched. If this were not the law, we would have the absurd result that the rights of the Bridge Company upon this Supplemental Bill would be greater than they would have been upon an original bill or upon a cross-bill for affirmative relief in the original proceedings.

Point VII.

The scope of the decree in the Supplemental and Ancillary Proceedings is broader than the decree in the Foreclosure Cause and in effect substantially "pieces out" that decree. The case is a typical one for the application of "Lord Redesdale's Rule."

The essential part of the final decree in the Foreclosure Cause is as follows:

> "That the bill of the plaintiffs be dismissed as to the plaintiff, Phoenix Finance Corporation, and that

> the prayer of the bill be denied, except insofar as the decree provides for the protection of the holders of said $15,000.00 in bonds. *That foreclosure and sale of the mortgage property be denied* * * *."

The scope of the decree as appears from the above portions thereof is an exceedingly narrow one. It is not claimed by the Bridge Company that this decree was not carried into effect or in any way requires implementation. There has been no other attempt by the Trustee under the deed of trust to foreclose in any other form. It is true that Phoenix as a creditor of the Bridge Company on certain underlying indebtedness has brought suit in the courts of Delaware. These suits are in no way enjoined by the decree in the Foreclosure Cause. It is accordingly urged that in filing the Supplemental and Ancillary Bill, the Bridge Company sought to enlarge and "piece out" the original decree far beyond its original scope. To do this, it must show that the decree is a "right" one under the principle of "Lord Redesdale's Rule."

The decree of March 23, 1940 in the Supplemental and Ancillary Cause enjoins and restrains Phoenix from prosecuting or carrying forward any and all of the actions of law and equity instituted by Phoenix against the Bridge Company in Delaware. The issues involved in the cases pending in the courts of Delaware, and the issue that would be involved if the $50,000 "open" mortgage were sought to be enforced for the total obligation of $59,000, are in no way directly treated in the decree denying foreclosure of the deed of trust and dismissing the bill for foreclosure.

The mortgage dated March 10, 1931 executed by Iowa-Wisconsin Bridge Company and recorded in Allamakee County, Iowa and Crawford County, Wisconsin was not in issue in the Foreclosure Cause, is not referred to in any

decree in that cause, and was in fact not recorded in the two jurisdictions until June 2, 1939 in Allamakee County, Iowa, and May 18, 1939 in Crawford County, Wisconsin. The Supplemental and Ancillary Bill seeks, and the decree by mandatory order directs, Phoenix to satisfy this recorded mortgage and to deliver the note for $50,000 for which it is secured to the Court for cancellation. The note for $50,000 was not an exhibit in the Foreclosure Cause and there is no reference anywhere in the findings of fact of the Master or of the Court as to the existence of such a note. It is submitted that a decree which now directs Phoenix to satisfy a mortgage which was not involved in the Foreclosure Cause and to deliver up for cancellation a note, the existence of which is unknown to the record of the Foreclosure Cause, is necessarily an enlargement and "piecing out" of the original decree.

Again, the appellant urges that there was no issue in the Foreclosure Cause as to the right of Phoenix, as an involuntarily impleaded party plaintiff, to recover or have restored to it by the Bridge Company defendant the 517 shares of Bridge Company preferred stock which had been delivered to the Bridge Company in exchange for certain of the bonds secured by the deed of trust, the foreclosure of which was sought. *In the Delaware Chancery action, Phoenix is not seeking to recover these shares because the consideration for the exchange has been invalidated by the decree of December 1, 1936, but on entirely separate and distinct issues*, both of law and of fact. The mandatory order in this cause directing Phoenix to dismiss the Delaware Chancery action must of necessity be regarded as an enlargement of the scope of the decree in the Foreclosure Cause, not only because that decree does not deal with the subject, but also because the issues involved are entirely different.

It cannot be here said, as was stated by the court in the case of *Utah Power & Light Co.* v. *U. S.*, 42 F. (2d) 304, in refusing to apply Lord Redesdale's Rule as approved in *Lawrence Mfg. Co.* v. *Jamesville Cotton Mills, supra*, that—

> "No modification of the former decree is sought. The plaintiff stands on the decree as it is and the case is not one in which a new trial of the former action can be had."

This case is rather one for the application of Lord Redesdale's Rule in supplementary proceedings to enlarge a decree. See the case of *Gay* v. *Parpart*, 106 U. S. 679, 27 L. Ed. 256, wherein the Supreme Court approved of the following language of the Illinois Supreme Court:

> "We do not regard that it militates with the doctrine of the conclusive effect of what is *res adjudicata* that where there is an *incomplete decree* and it is ineffective for want of the provision of any means for its execution, and an application is made to a court of equity to supply the imperfection so as to render the decree effective, then it is admissible to look at the real nature and character of the decree as it may appear in the light of surrounding circumstances for the purpose of determining whether there is such an equitable ground for action as will move a court of equity to interpose. Equity will penetrate beyond the covering of form and look at the substance of a transaction and treat it as it really and in essence is, however it may seem."

The very fact that the question before this Court has been raised by the filing of a *Supplemental* Bill in the court below is indicative that the Bridge Company seeks an enlargement of an earlier decree. The very nature of a supplemental bill requires a change of the original decree. This is rudimentary pleading. See Volume 21, *Encyclopedia of Pleading and Practice*, pp. 70-71, where it is stated:

> "Where it does not appear from the supplemental bill that there is any alteration in the interests of the parties, or that there are any particular circumstances

> requiring further discovery, and the subsequent matter alleged is not such as to vary the relief sought under the original bill, the supplemental bill is bad."

It is also apparent that the *degree* of change in an earlier decree sought by the filing of a supplementary bill is not important so long as some additional relief is sought.

In the case of *Lewers and Cooke* v. *Atcherly*, 222 U. S. 285, 56 L. Ed. 202, an earlier decree ordered the conveyance of property to appellant's predecessor in title. In the later proceedings, the appellant prayed in his bill that title to the property be registered and that the title be confirmed. While this relief was virtually the same as that originally sought by appellant's predecessor in title, the Supreme Court stated that under such circumstances the appellants were in "the same position as a party asking the aid of a Court of Chancery in executing a former decree, and it is well established that he must take the risk of opening up such decree for re-examination." Citing *Lawrence Mfg. Co.* v. *Janesville Cotton Mills, supra.*

In the case of *American Radium Co.* v. *Hipp Didisheim*, 279 Fed. 601, the original decree failed to provide that its benefits should run to the successors or assigns of the original plaintiff. Ancillary proceedings were brought by one other than the original plaintiff to obtain the fruits of the earlier decree and also asking for an accounting. The Court applied the rule of *Lawrence Mfg. Co.* v. *Janesville Cotton Mills, supra*, and decided that the original decree was not *res adjudicata* and that the case must be considered on its merits.

In the case of *O'Brien* v. *Wheelock*, 184 U. S. 450, 46 L. Ed. 636, the Court denied the relief sought in the ancillary and supplementary proceedings largely on the grounds of *laches*, but it declared that it had the power to inquire into the nature of a supplemental bill. The only material change in the supplementary proceedings was that landowners, some

of whom had acquired land involved in the original proceedings many years after the original decree, were brought in as parties to the supplementary proceedings.

It is submitted that the Court below has destroyed the equitable principle inherent in Lord Redesdale's Rule by refusing to apply it to a supplementary and ancillary bill which seeks supplemental and additional relief based upon facts that had not occurred and were not even in contemplation at the time of the decree in the Foreclosure Cause.

Point VIII.

The District Court in the Supplemental and Ancillary Proceeding should, when raised by way of defense, have taken cognizance of the tendered proof of fraud inherent in its own decree.

As a corollary to Lord Redesdale's Rule, it is held that a party may attack a judgment obtained by fraud in any subsequent proceeding thereon. The District Court, therefore, erred in rejecting the tendered proof of fraud inherent in its decree in the Foreclosure proceedings as a result of conduct on the part of the Bridge Company, the interveners, and their counsel.

Webster v. *Reid*, 11 How. 437, 13 L. Ed. 761.

There is a clear and well established distinction between those cases where a party is seeking *affirmatively* to have a judgment or decree set aside on the ground of fraud and those cases (like the case *sub judice*) where a party is *defending* against a suit to enforce the alleged fraudulent judgment or decree. Cases in the former category seem to hold generally that fraud to be available in an *affirmative* attack upon a decree must be extrinsic to the issues.

U. S. v. *Throckmorton*, 98 U. S. 61, 25 L. Ed. 93;
Marshall v. *Holmes*, 141 U. S. 589, 35 L. Ed. 870;
Atchison T. & S. F. Ry. Co. v. *U. S., etc.*, (C. C. A. 8) 106 F. (2d) 899.

In cases of the latter category, however, the *defending* party may offer any available evidence to show that the decree sought to be enforced is not a "right" one. This brings us back again to the application of "Lord Redesdale's Rule," discussed *supra*. See also *Publicker* v. *Shallcross* (C. C. A. 3), 106 F. (2d) 949, wherein the Court stated as to the maxims "*interest rei publicae ut sit finis litium*" and "*memo debet bis vexari pro una et eadam causa:*" "We believe truth is more important than the trouble it takes to get it."

Even if the rule of the *Throckmorton* case was controlling in the case of a party *defending* against the enforcement of an alleged fraudulent decree, nevertheless the evidence tendered in the court below comes within an express exception to the rule of that case. The Supreme Court speaking through Mr. Justice Miller stated that one of the grounds "for which a new suit may be sustained to set aside and annul the former judgment or decree and open the case for a new and fair hearing * * *" was "*where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent.* * * *" (Emphasis supplied.)

This exception is well emphasized in the case of *Chicago R. I. & P. Ry. Co.* v. *Callicotte* (C. C. A. 8), 267 Fed. 799.

Particularly is the exception stated by Mr. Justice Miller applicable here. Phoenix, the unsuccessful party in the Foreclosure Cause, was prevented from fully exhibiting its case by reason of three circumstances, with respect to only the first of which it can be said to be at fault to any extent: (1) because of the misunderstanding, or rather the tacit understanding with respect to the two-stage theory, (2) when the procedural error became evident, it was denied relief on petition for rehearing because of false representations of opposing counsel accepted by the Court with re-

spect to its alleged failure to produce books as ordered, and (3) the circumstance of extrinsic fraud stated in paragraph 44 of the Answer and Counterclaim of Phoenix (R. 166).

Conclusion.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory power in order that the aforesaid manifest error may be corrected, the courts below limited to their proper jurisdiction and the petitioner accorded due process in the ligitation of its *bona fide* claims. To this end, a writ of certiorari should be granted so that this Court may review the decision of the Circuit Court of Appeals for the Eighth Circuit and ultimately, and after further argument, reverse the same.

JAMES R. MORFORD,
Counsel for Petitioner.

MARVEL & MORFORD,
AIMMERMAN & NORMAN,
CASPER SCHENK,
Of Counsel.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

OCTOBER TERM, 1940

No. 4

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION OF THE STATE OF DELAWARE

Defendant below
Plaintiff in Error

vs.

PHOENIX FINANCE CORPORATION, A CORPORATION OF THE STATE OF DELAWARE

Plaintiff below
Defendant in Error

This Is To Certify that writ of error captioned as above and bearing the above term number was docketed in this Court by Iowa-Wisconsin Bridge Company, the defendant below, plaintiff in error, on the 9th day of September, 1940; that the appearance of James R. Morford of the firm of Marvel & Morford, Wilmington, Delaware, was entered as attorney for Phoenix Finance Corporation, the plaintiff below, defendant in error, on the 11th day of September, 1940; that said writ of error is pending argument in the Supreme Court of the State of Delaware and will be regularly calendared for argument at the January Term of said Court convening on the third Tuesday in January,

1941. I further certify that Rule 24 of the Supreme Court of the State of Delaware provides as follows:

> "All causes, except applications for writs of mandamus or prohibition, shall be deemed to be at issue upon the appearance of the defendant in error or appellee."

In Witness Whereof, I have hereunto set my hand and the Seal of the Supreme Court of the State of Delaware, this 30th day of November, A. D. 1940.

W. MARION STEVENSON,
Clerk of the Supreme Court
of the State of Delaware.

[Seal.]